(17)

No. 84-571

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

24 pp

TABLE OF AUTHORITIES

Cases: Page

"Agent Orange" Product Liability Litigation, In re, MDL No. 381 E.D.N.Y. Feb. 8, 1985) 11
Boddie v. *Connecticut*, 401 U.S. 371 5
Califano v. *Yamasaki*, 442 U.S. 682 3
Gault, In re, 387 U.S. 1 3
Goldberg v. *Kelly*, 397 U.S. 254 ..... 4, 5
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 8
Landon v. *Plasencia*, 459 U.S. 21 6
Leary v. *United States*, 395 U.S. 6 7
Mathews v. *Eldridge*, 424 U.S. 319 ..... 3, 5, 7, 13
Ortwein v. *Schwab*, 410 U.S. 656 ..... 5, 10
Richardson v. *Perales*, 402 U.S. 389 13
Schweiker v. *McClure*, 456 U.S. 188 3
United States v. *Boyle*, No. 83-1266 (Jan. 9, 1985) .. 14
United States v. *Kras*, 409 U.S. 434 5
United States v. *New Mexico*, 455 U.S. 720 9

Constitution, statute and regulations:

U.S. Const.:
Amend. I 10
Amend. V (Due Process Clause) 5
38 U.S.C. 3404 2
38 U.S.C. 3404(c) 1, 5, 6, 8, 9, 10
38 C.F.R.:
Section 3.102 14
Section 19.121(b)(2) 15
Section 19.121(b)(3) 15
Section 19.123(a) 15
Section 19.180(a) 15

Miscellaneous:

131 Cong. Rec.:
p. H294 (daily ed. Feb. 4, 1985) 9
pp. S930-S937 (daily ed. Jan. 31, 1985) 9
H.R. 924, 99th Cong., 1st Sess. (1985) 9
H.R. Rep. 1454, 87th Cong., 2d Sess. (1962) 16

Miscellaneous—Continued: Page

H.R. Rep. 98-592, 98th Cong., 2d Sess. (1984) 11, 14
S. 367, 99th Cong., 1st Sess. (1985) 9
S. Rep. 1843, 87th Cong., 2d Sess. (1962) 16
S. Rep. 97-466, 97th Cong., 2d Sess. (1982) 9
Washington Post, Feb. 12, 1985 11

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-571

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

Appellees and their amici fundamentally misconceive the nature of the legal issue in this case. In addition, although in our view it is not material to decision of the constitutional question presented, they significantly misconstrue the record developed during discovery. We shall first address the legal analysis that governs this case and then respond to appellees' characterization of the record.

I

1. Appellees contend that the only question before this Court is whether the district court abused its discretion in entering the preliminary injunction against enforcement of the fee limitation in 38 U.S.C. 3404(c). However, for the reasons stated in our opening brief (VA Br. 20-23), an appellate court has plenary authority to review and set aside a preliminary injunction that, as in this case, is premised on a fundamental and decisive error of law. Indeed, meaningful appellate review is especially appropriate and necessary here, since the court below enjoined a federal statute that Congress has adhered to for more than a century. A district court simply has no dis-

cretion to commit legal error and declare unconstitutional a valid Act of Congress.

2. In addition, appellees have all but ignored (see NARS Br. 26 n.16) one of our central contentions: even accepting arguendo appellees' assertion of numerous defects in the operation of the VA claims system, that would provide no basis to invalidate the fee limitation in Section 3404. See VA Br. 19-20. Appellees have not disputed that Congress intended the claims system to be an informal and nonadversarial process in which VA personnel and service organizations afford effective assistance to veterans without charge. Insofar as the system deviates from this design in practice, the appropriate remedy would be to correct those deficiencies by requiring compliance with the congressional scheme, not to strike down the fee limit and thus work a further departure from Congress's plan by making the system more formal and adversarial. Appellees have nowhere come to grips with this inherent conceptual flaw in their case.

3. Appellees purport to challenge the fee limitation provision "as applied" in so-called "complex" cases. See NARS Br. i, 2, 3, 21, 31-32 & n.21. This characterization is highly misleading. By its terms, appellees' argument focuses not on discrete and particular cases, which is the customary meaning of an "as applied" attack, but on broad categories of cases. Their approach entirely disregards the myriad differences that exist among these cases in terms of the circumstances of the claimants and their claims.

Moreover, the substance of appellees' position is not restricted to the asserted class of "complex" cases. Many of their objections to the VA's operation of the claims system, for example, are equally relevant system-wide. Indeed, appellees themselves recognize this fact (see NARS Br. 18). And, in an attempt to defend the overbroad relief entered by the district court (see VA Br. 14, 22), appellees expressly submit that "the fee limitation is unconstitutional in all of its applications" (NARS Br. 45 n.35).

4. Beyond this, appellees have failed to acknowledge several of the most important considerations that bear on the validity of the fee limitation. For example, they do not take account of the fact that they are challenging a federal statute that reflects Congress's consistent policy in this area since the time of the Civil War. As this Court has recognized, however, even in a due process case there is a "strong presumption in favor of the validity of congressional action" (*Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982)) and a "willing[ness] to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)).

Appellees also attempt to divorce the fee limitation from the overall context of veterans' programs. As discussed in our opening brief (at 27 n.24, 31 n.30), Congress has established a wide range of VA benefits and services that demonstrate a special concern for veterans; the nonadversarial claims system is reflective of the broader nonadversarial relationship between the government and veterans. Even within the service-connected claims system itself, Congress has provided special advantages and protections for veterans, including the affirmative obligation of the VA to assist them in making successful claims, the availability of free representation by accredited service organizations, and the liberal procedural and substantive standards applicable to such claims (see VA Br. 3-10, 27-28). Because " 'due process is flexible and calls for such procedural protections as the particular situation demands' " (*Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted)), appellees err in treating the fee limit as though it were part of a conventional adversarial process. Compare, *e.g.*, *In re Gault*, 387 U.S. 1, 36 (1967).

Appellees assert (NARS Br. 33) that invalidation of the fee limitation, and the concomitant influx of lawyers, would not affect the informal and nonadversarial nature of the VA claims system. This assertion defies common sense and is inconsistent with the decisions of this Court, which recognize the undesirable effects that counsel can

have on such a process (see VA Br. 30-31). Appellees' very argument in favor of counsel—with its emphasis on increased hearings, cross-examination, expert witnesses, lengthy briefing, and the like (see NARS Br. 10, 13-14, 17, 28-31)—belies their blithe conclusion that the beneficial aspects of the claims system will remain unaltered.

Furthermore, these changes will redound to the detriment of veterans as a group. As the system now stands, the overwhelming majority of claimants are able to have their applications processed efficiently and satisfactorily without delay, without formality, and—most importantly—without the retention of an attorney whose fee will be paid from either the VA benefit award or the veterans' out-of-pocket funds.[1] Elimination of the fee limit would thus sacrifice the interest of the majority who are well-served by the existing process. Indeed, added participation by lawyers may induce veterans mistakenly to believe that retained counsel is necessary for the adequate presentation of a claim. See Verrill Dep. 199. Finally, as amicus curiae Disabled American Veterans demonstrates, the increased presence of attorneys could substantially impair the continued role of service organizations in the claims system. It is for Congress, not the courts, to accommodate these competing interests of all veterans, and Congress has consistently struck the balance in favor of the fee limit.

In support of their argument for a due process right to retain counsel, appellees rely primarily on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). That argument, however, disregards the subsequent decisions of this Court that have recognized in a number of settings that lawyers are not necessary to the fundamental fairness of an administrative process (see VA Br. 26). In any event, *Goldberg* v. *Kelly* is readily distinguishable. The welfare termination procedure at issue in that case was clearly more adver-

[1] Appellee American G.I. Forum contemplates (Br. 5 nn.1, 2) that a "complex" case would require 500 hours of attorney time at a rate of $100 per hour, or a total bill to the veteran of $50,000. See also J.A. 523.

sarial than the VA process, with none of the special protections and benefits that are provided in the VA system (397 U.S. at 257 n.3, 264 n.12, 269, 270-271). Moreover, in contrast to the VA process, many of the terminations of welfare payments turned on disputed issues of fact (*id.* at 268) as to which "credibility and veracity are at issue" (*id.* at 269); in that situation the skills of a lawyer were held to be essential to a fair hearing. Finally, *Goldberg* v. *Kelly* dealt with need-based welfare benefits that provided "the very means by which to live" (*id.* at 264); while service-connected benefits are unquestionably important to veterans and their dependents, such benefits are not based on standards of financial need and, like the social security disability benefits in *Mathews* v. *Eldridge* (424 U.S. at 340-343), do not give rise to the same private interest that was at stake in *Goldberg* v. *Kelly*. Accordingly, *Goldberg* v. *Kelly* does not establish a right to retained counsel in the VA claims system.[2]

5. For the reasons explained in our opening brief (at 24-32), the fee limitation in 38 U.S.C. 3404(c), viewed in the context of the informal and nonadversarial claims system that Congress intended, does not violate procedural due process. The fact that Congress elected not to

[2] *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), also does not support appellees' position. In that case the Court struck down a filing fee for seeking a divorce in state court. The decision rested on the fundamental importance of marriage in our society, the absolute preclusion of access to the courts that occurred in some cases, and the fact that such exclusion resulted from the litigant's indigency. *Boddie* does not extend beyond its particular situation (see *United States* v. *Kras*, 409 U.S. 434 (1973); *Ortwein* v. *Schwab*, 410 U.S. 656 (1973)) and casts no doubt on the fee limit in the VA claims system.

Contrary to the suggestion in some of the opposing briefs, our argument does not depend on the "right-privilege" distinction. The fact that veterans' benefits are funded entirely by the public treasury (see VA Br. 3, 32) does not mean that no process is constitutionally due. On the other hand, the Due Process Clause, in weighing the relevant public and private interests, should accord Congress especially wide latitude to structure programs to administer benefits of this kind.

follow the traditional judicial model of an adversary proceeding, and instead created an alternative dispute resolution mechanism in which lawyers are not necessary to a fair procedure, does not state a due process violation. Thus, in the absence of an adequate basis to conclude that the VA claims system is fundamentally unfair without retained counsel, appellees' challenge to the constitutionality of Section 3404(c) must fail.[3]

Appellees recognize that such a threshold showing of unfairness attributable to the fee limit is indispensable to their argument. In an effort to meet their burden, they rely on the record that was compiled by the parties in discovery in this case. In the next section, we shall address appellees' specific assertions about the record. At this point, we raise more fundamental objections to appellees' basic approach.

Initially, we point out that appellees' position largely rests on the statements of individual claimants and attorneys who are dissatisfied with the VA claims system and, in particular, the fee provision. We do not doubt that in any large-scale benefit program some individual cases may be incorrectly decided. Nor do we doubt that some people may feel that the system is unfair. However, without impugning the good faith of those involved, we do doubt that such essentially impressionistic, anecdotal, and self-interested statements provide an adequate ground for a court to upset the considered enactments of Congress. Such an approach by its very nature offers an insufficiently comprehensive and reliable basis for a court to determine whether the overall system is fundamentally unfair as a result of the fee limit and thus to invalidate a statute enacted into law by the democratic branches of government.

---

[3] Once the constitutionally required level of fairness has been met, the need for any further improvements is a matter for Congress. At that point, the question whether an additional increment in accuracy is justified, and at what cost, is an issue of legislative policy, not constitutional command. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 35 (1982).

As explained in our opening brief (at 33-43), Congress has recently undertaken an extensive examination of the nature and operation of the existing VA claims system and has concluded that the system is nonadversarial and informal, that the VA and the service representatives provide effective assistance to claimants, that the system performs fairly and adequately without retained attorneys, and that an influx of retained lawyers would be undesirable and have adverse consequences for the benefits process. Appellees concede (NARS Br. 3, 21 n.12), as they must, that the district court's findings are both essential to its preliminary injunction against the validity of the fee limitation and irreconcilable with the determinations of Congress. The issue of the effect of the fee limit on the fairness of the claims system goes to the overall operation of the system, not the results in a relative handful of carefully selected cases. It is not a proper judicial function to conduct, in the guise of a due process inquiry, a legislative-type hearing into the overall fairness of a complicated nationwide benefit program. See also *Leary* v. *United States*, 395 U.S. 6, 35-36, 38 n.68 (1969).

Contrary to the suggestion in several of the opposing briefs, our argument does not require a court to abdicate its judicial responsibility. As our opening brief notes (at 36-37), it is and remains the ultimate duty of the federal judiciary to decide whether due process standards are satisfied.[4] But in fulfilling that duty, a court should apply the constitutional standard to the system as assessed by Congress. A court is free to conclude, where warranted as a matter of substantive law, that an administrative procedure is unconstitutional because the nature and operation of the overall system as determined by the legislature do not meet due process; at the same time, a court is not free to ignore those legislative

---

[4] Even there, as the Court has recognized (see VA Br. 37 n.38), substantial weight should be accorded to the views of Congress and the responsible administrative agency. Appellees' response on this point (see NARS Br. 49 n.39), among other difficulties, simply ignores our citation to *Eldridge*, 424 U.S. at 349.

determinations and apply the constitutional standard to its own appraisal of the general process.[5]

Appellees object, however, that Congress's determinations upon which we rely are of no moment because the bills under consideration were not enacted into law. This objection is without merit. As described in our opening brief (at 38-43), the bills in question were passed by the Senate but not by the House. The Senate bills would have, among other things, modified the fee limitation, but only with respect to reconsideration before the Board of Veterans' Appeals and suits for judicial review as authorized in the proposed legislation; the fee modification was thus incident to the new provision for judicial review. At all stages of the VA administrative process through the initial BVA decision, the Senate bills retained the fee limit in Section 3404(c). It was in this setting that the legislative record established the informality and nonadversariness of the VA process and the adequacy of the representation provided by service organizations without charge. Since the bill that passed the Senate would have left the existing fee limit in place in the basic administrative system, the Senate's determinations concerning the nature and operation of that system—including, specifically, the fee limit—cannot, as appellees would have it, simply be shrugged off.[6]

---

[5] Appellees' reliance (NARS Br. 46, 47) on *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843-844 (1978), is misplaced. The question whether a particular newspaper publication presents a "clear and present danger" plainly involves a specific adjudicative determination rather than, as in the instant case, a general legislative one. Moreover, the "clear and present danger" issue is a mixed question of law and fact; just as a court would not have to accept Congress's ultimate conclusion that a given process is constitutionally fair, so too it would not have to accept a legislative conclusion that the legal "clear and present danger" standard is met.

[6] Appellees assert (NARS Br. 43 & n.32) that the Senate report itself recognizes the unfairness of the fee limit in the administrative process. This assertion is highly misleading. The material omitted in appellees' carefully edited quotation makes clear that the report was addressing the participation of retained attorneys at the BVA reconsideration stage and not in the rest of the VA

These determinations are not undermined by the fact that the bills were not adopted by the House. Rather, the House was unwilling to make even the limited modification in the fee provision that the Senate had passed. The House's refusal to concur in the Senate's proposed change surely does not discredit the determinations underlying the decision—with which both chambers agreed—to retain the existing fee limit for the basic administrative process. On the contrary, the legislative record can fairly be said to constitute a determination, from which no disagreement or dissent was anywhere expressed in Congress, that the VA claims system operates in an informal and nonadversarial manner, that service representatives provide effective assistance to claimants without charge, and that retained attorneys are not necessary to a fair procedure.

6. In the end, appellees are "asking [the Court] to establish as a constitutional rule something that [they were] unable to obtain statutorily from Congress." *United States* v. *New Mexico*, 455 U.S. 720, 744 (1982). It is plain that the wisdom and desirability of the fee limitation in 38 U.S.C. 3404(c) are matters of considerable controversy and dispute. But just as plainly, that debate is for Congress, not the courts, to resolve. Congress has recently considered, and continues to consider, the issue.[7] It is to that body that appellees should address their arguments.[8]

---

claims system. See S. Rep. 97-466, 97th Cong., 2d Sess. 51 (1982) (appellees' omission supplied in italics):

> However, an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied *a second time by the Board of Veterans' Appeals and will be appealed to court.*

[7] In addition to the currently pending bills cited in our opening brief (at 38 n.39, 44-45 & n.44), see also S. 367, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. S930-S937 (daily ed. Jan. 31, 1985); H.R. 924, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. H294 (daily ed. Feb. 4, 1985).

[8] For the reasons stated in our opening brief (at 46-49) the fee limit, if not a violation of due process, also does not violate appel-

II

In support of their position, appellees place essential reliance on the discovery record in this case. As discussed above, this record does not govern the legal issue presented here of the constitutional validity of 38 U.S.C. 3404(c). However, we cannot allow to go unanswered appellees' repeated misstatements of the record and aspersions upon the Veterans' Administration. Accordingly, we shall briefly respond to the most significant of appellees' assertions.

1. Appellees contend that claims involving Agent Orange, atomic radiation, and post-traumatic stress disorder (PTSD) are complex, that these complex claims are almost invariably denied, and that "[t]he fee limitation contributes to minuscule success rates in complex claims" (see NARS Br. 8-9). These contentions are without merit.

First, the record clearly shows that not all, or even most, of the Agent Orange, atomic radiation, and PTSD claims are complex; while such claims may be controversial in many ways, they are frequently routine and uncomplicated to decide. See Verrill Dep. 381; Standefer Dep. 50, 201, 264; Hawke Dep. 138, 140. Moreover, those cases, and especially the Agent Orange and atomic radiation cases, constitute only a very small proportion of the millions of claims that the VA handles each year. See Verrill Dep. 380, 381; Standefer Dep. 234; Woodall Dep. 34, 203; Jacobson Dep. 82.

It is also misleading to argue that complex claims are automatically and routinely denied. For example, many PTSD claims have been allowed. See Verrill Dep. 128, 430. Similarly, Agent Orange claims involving chloracne

lees' First Amendment rights to meaningful and effective access to the administrative process. See also *Ortwein* v. *Schwab*, 410 U.S. 656, 660 n.5 (1973) ("[o]ur discussion of the Due Process Clause * * * demonstrates that [the parties'] rights under the First Amendment have been fully satisfied"). Appellees acknowledge (NARS Br. 22) that their First Amendment argument rests on the same facts as their due process argument.

have also been granted on a regular basis. See Verrill Dep. 482, 491, 496; Jacobson Dep. 59.

On the other hand, where these assertedly complex claims have been denied, the decisions have been based either on existing and accepted medical principles, which fail to establish a causal connection between the event in service and the disease in question, or on the absence of facts in the particular case to provide reasonable support for the claim.[9] With respect to Agent Orange, there is no demonstrated relation between exposure and subsequent diseases other than chloracne, and the VA has simply followed this medical conclusion in denying Agent Orange claims. See Verrill Dep. 196; Standefer Dep. 240; Woodall Dep. 69-70, 72, 256; Jacobson Dep. 47-48; see also VA Br. 32-34 n.34.[10] Likewise, medical research has not shown a relation between low levels of radiation and the diseases for which benefit claims are being denied. See Standefer Dep. 73, 195-197; Woodall Dep. 35-36, 143, 256, 276; Hawke Dep. 40. See also H.R. Rep. 98-592, 98th Cong., 2d Sess. 7, 9 (1984). And many Agent Orange and atomic radiation cases are denied because the service and medical records prove that the veteran's claim of exposure is simply incorrect, because the disease is clearly the result of some other cause such as heredity or chronic cigarette smoking, or because the veteran had no disability at all. See Verrill Dep. 176, 192-193; Jacobson Dep. 154-155; H.R. Rep. 98-592, *supra*, at 6.[11] PTSD

[9] Medical research, much of which is conducted or funded by the government, is continuing in these areas. See, *e.g.*, H.R. Rep. 98-592, 98th Cong., 2d Sess. 4-5, 7 (1984); R. 151, Exh. 186, at 2.

[10] See also *In re "Agent Orange" Product Liability Litigation*, MDL No. 381 (E.D.N.Y. Feb. 8, 1985), slip op. 20, 23; H.R. Rep. 98-592, *supra*, at 4, 5, 7-10, 13; Washington Post, Feb. 12, 1985, at A12, col. 2.

[11] In the case of plaintiff Maxwell, for instance, the VA found that the location of his enemy prison camp was more than 300 miles from Hiroshima, not 80 miles as he alleged. See Verrill Dep. 470; Hawke Dep. 86. In the case of plaintiff Wilson, the VA was able to determine from service records that her husband, in his job as a technician, would not have been exposed to the levels of radiation that were claimed. See Verrill Dep. 261-262.

claims have also been denied because the service records disprove the alleged traumatic event or the disability was clearly caused by either a pre-existing personality disorder or an intervening factor such as drug or alcohol abuse. See Verrill Dep. 417, 419, 427.[12]

In sum, it is the lack of merit of these claims, not the absence of lawyers, that leads to their rejection. See Verrill Dep. 95, 233; Standefer Dep. 195-196. Indeed, even though plaintiff Swords to Plowshares (see J.A. 171; VA Br. 48 n.54) and amicus curiae Vietnam Veterans of America (see VVA Br. 2) use attorneys as service representatives, appellees have adduced no evidence that they have higher success rates than other organizations in so-called complex cases involving Agent Orange, atomic radiation, and PTSD.

2. Appellees also assert that the VA claims system is complicated, that it is adversarial, and that VA personnel do not assist claimants in seeking benefits.

We do not dispute that the VA system is complicated, in the sense that it is governed by an extensive array of substantive and procedural provisions that might well confuse an inexperienced claimant if he attempted to pursue an application for benefits without the help of the VA and a service representative. But that proposition is simply irrelevant to this case. First, no single claim involves the full range of provisions that the VA has promulgated to deal with the host of issues that may arise in the entire claims system. Moreover, the relevant provisions are explained to the claimant in lay terms that are easily understood and intelligible (see page 13, *infra*). Finally, the veteran need not stand alone in developing and presenting his claim; instead, it is the responsibility of the VA and the service representative to aid him in establishing his claim.[13]

---

[12] In some instances, for example, the VA found that veterans alleging a traumatic combat experience in Vietnam had never been stationed in Vietnam. See Phillips Dep. 87.

[13] Appellees often present a misleading picture of the claims system by discussing *unrepresented* veterans and the problems that they might face if they were proceeding entirely on their own. See NARS Br. 5, 7, 16, 18. This ignores the important role of the VA and the service organizations in the nonadversarial process and thus distorts the administrative context in which the fee limitation must be viewed.

The record lends no support to appellees' characterization that the VA system is adversarial. On the contrary, the evidence of VA officials consistently establishes that they administer the system in a nonadversarial and unbiased manner and furnish substantial assistance to the claimant in an effort to grant benefits. See Verrill Dep. 199; Standefer Dep. 37, 43, 50, 136, 171, 225-226, 257-258, 269; Woodall Dep. 35, 37, 84, 87; Jacobson Dep. 20-22, 88, 93-94, 129, 143, 148, 154, 161, 166, 180-181, 184; Phillips Dep. 17, 41, 53; Hawke Dep. 4, 141-142, 146.[14]

Nor do any of appellees' specific complaints demonstrate that the system is an adversarial one in which the VA opposes rather than aids the claimant. Appellees note that time limits exist for the submission of certain forms or information and that failure to comply can result in denial of a claim. However, they ignore the fact that there are very few such time limits, that the periods provided are usually quite generous (for example, a one-year period for filing a simple document, called a notice of disagreement, that is similar to a notice of appeal and serves to initiate the VA appeals process), and that the requirements are clearly explained to claimants and easily satisfied. See Verrill Dep. 307, 513; Woodall Dep. 144-146; Jacobson Dep. 143, 148. The provisions for timely and efficient processing of a claim are hardly oppressive and plainly do not necessitate the adversarial skills and guid-

---

[14] One of appellees' witnesses stated that "[t]he VA claims process is truly an adversarial process" because "[t]he VA has the money and the veteran wants it. What's more adversarial than that?" See R. 66, Stavick Decl. ¶ 9. Such a simplistic and indeed cynical view does not indicate that the system is adversarial. Compare *Eldridge*, 424 U.S. at 339; *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971). See also Verrill Dep. 41-42 (interest of the VA is to award benefits wherever possible under the law); compare NARS Br. 17 n.8.

ing hand of a lawyer. Cf. *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985).

In addition, appellees object that a claimant has the burden of proof to establish his entitlement. The applicable standard is that the claimant must "submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. 3.102. This requirement is met where there is "some evidence" indicating "a reasonable possibility of a valid claim." Jacobson Dep. 23-24. Such an exceedingly liberal standard, especially in view of the reasonable doubt doctrine in favor of the claimant (38 C.F.R. 3.102) and the assistance provided by the VA and the service representative, does not show that the system is unfair or adversarial.

Indeed, despite appellees' seeming complaints about it, the reasonable doubt standard well illustrates the supportive and nonadversarial nature of the process. This standard requires that benefits be granted if there is a reasonable and non-speculative basis for finding a valid claim. See Verrill Dep. 32; Standefer Dep. 197; Woodall Dep. 113, 143; Phillips Dep. 86; Hawke Dep. 127, 136-137. In applying this standard to the types of "complex" cases that appellees emphasize, the VA will concede a claimed exposure to Agent Orange if the veteran was in Vietnam and the exposure is not affirmatively disproved by service records (see Verrill Dep. 494-495; Woodall Dep. 71; Phillips Dep. 75; H.R. Rep. 98-592, *supra*, at 17); in atomic radiation cases, the VA will concede both the claimed presence at the site and the claimed level of exposure unless it can prove to the contrary (see Verrill Dep. 66, 97, 203, 261-262, 316, 470, 537; Standefer Dep. 232); and, with respect to PTSD, the VA will accept the alleged in-service trauma, even in the absence of corroborating documentation, unless the veteran's records refute the claim or there was a pre-service trauma that is the cause of the asserted disability (see Verrill Dep. 419, 424-429, 431; Woodall Dep. 149-150, 152; Jacobson Dep. 102).

Appellees further argue that the system is unfair and adversarial because the claimant is instructed that his

"substantive appeal should set out specific argments as to error of fact or law" and that he "will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken." 38 C.F.R. 19.121(b)(2) and (3); see also 38 C.F.R. 19.123(a), 19.180(a). However, the regulations also provide that the Board of Veterans' Appeals "will construe [the claimant's] arguments in a liberal manner for purposes of determining whether they raise issues on appeal" (38 C.F.R. 19.123(a)) and that, notwithstanding the above instructions, "[d]ecisions of the Board * * * shall be based on a review of the entire record" (38 C.F.R. 19.180(a)). In fact, the provisions on substantive appeals are applied in a very informal and non-technical fashion. See Verrill Dep. 467; Standefer Dep. 153-156, 163; Jacobson Dep. 187.

Appellees also assert that an insignificant number of BVA appeals are taken and that hearings are seldom held, and they accuse VA officials of "concerted efforts * * * to induce [claimants] to surrender important procedural rights" (NARS Br. 16). These contentions are unfounded.

First, in the VA recordkeeping system, the total number of decisions includes those, such as full benefit allowances, that as a practical matter would not be appealed. Moreover, several decisions can be made in the course of a single case, and each of these is separately counted in the VA's total even though they would be subject to only one appeal. See Verrill Dep. 160-167; Woodall Dep. 61-63; Jacobson Dep. 127. In addition, many claims are clearly insubstantial and seek benefits for which the veteran realizes he is probably ineligible. See Phillips Dep. 48, 87; Woodall Dep. 58, 60. Thus, by exaggerating the number of realistically appealable decisions, appellees significantly understate the true rate of appeals.

Furthermore, many claimants drop their appeals when, between the notice of disagreement and the substantive appeal, they receive the statement of the case from the VA Regional Office. This is exactly the way that Congress intended the process to operate; indeed, one of the prin-

cipal purposes of the statement of the case is to provide a full explanation of the initial decision in order to eliminate appeals that clearly would be meritless and would arise only because the claimant did not know or correctly understand the basis for the denial. See S. Rep. 1843, 87th Cong., 2d Sess. 2, 3-4 (1962); H.R. Rep. 1454, 87th Cong., 2d Sess. 5, 8 (1962). Accordingly, the fact that appeals are not pursued in light of the statement of the case does not demonstrate any unfairness or governmental overreaching. See Verrill Dep. 357; Standefer Dep. 108-109; Woodall Dep. 60, 237; Jacobson Dep. 144.[15]

Appellants also misperceive the nature of the hearing process on appeal. Hearings can be held before the BVA in Washington or, for the convenience of the claimant, before traveling panels of the BVA that conduct proceedings around the country. In addition, again for the convenience of the claimant and to enable him to avoid possible delays in waiting for a traveling panel, a veteran can elect to receive a hearing before the Regional Office and have the transcript submitted to the BVA for consideration in connection with the appeal. In total, hearings are held in approximately 35% of service-connected appeals. See J.A. 525, 527. And in the remaining cases, as the record reflects, hearings are frequently not requested because the veteran believes he has nothing more to present and it is not worth the time, expense, and effort to appear at a hearing. See Verrill Dep. 75, 356; Standefer Dep. 70, 123, 126; Woodall Dep. 58-59; Phillips Dep. 51; Jacobson Dep. 29, 183, 202.

---

[15] Appeals can also end for a number of other—and wholly innocent—reasons. For example, if the claimant dies, the appeal lapses. In addition, if the veteran brings up a new basis for benefits after the notice of disagreement is filed, it would be treated as an amended claim that would be considered by the Regional Office, and hence the existing appeal would be terminated without prejudice. See Woodall Dep. 238, 242. Or a claimant could simply choose to drop an appeal for a variety of personal reasons; plaintiff Maxwell, for example, elected not to appeal a denial because he was employed at the time and felt that benefits could better go to someone else (J.A. 308, 329).

Finally, appellees greatly mischaracterize the record in charging that the VA has engaged in a deliberate attempt to induce claimants to forgo hearings and other procedural rights. See Standefer Dep. 126. They rely entirely on two specific instances. First, they point to an informal, handwritten memo in one of the regional offices that stated that hearings should generally be held only after the statement of the case had been issued. The memo was designed to reduce a backlog in requested hearings, and minimize the burden for both the claimant and the agency, by postponing hearings where (1) an initial decision was likely to be a grant of benefits, so that no hearing would be necessary, and (2) a hearing was requested after an initial adverse decision but before the statement of the case, so that the claimant was not yet fully aware of the basis for the denial and would be entitled to a second, duplicative hearing after the statement of the case had been furnished to him. See Verrill Dep. 273-299, 409; Jacobson Dep. 29-33; Hawke Dep. 146-147. For present purposes, it is sufficient to note that this memo did not represent national VA policy and was not even controlling in the one Regional Office, that VA officials stated that the memo was erroneous and would have been corrected if they had known of it, and that in any event the memo was in effect only for a limited time and was superseded in 1982 by changes in the VA manual on hearing procedures. See Verrill Dep. 274, 282-283, 289, 295, 297, 299, 409; Woodall Dep. 15, 24-29, 136. Even conceding that the memo was mistaken, however, it hardly provides a basis for either condemning the good faith of the VA or striking down the fee limitation statute.

The other instance cited by appellees concerns two letters from a Regional Office to claimants that discuss the hearing process. Appellees contend that the letters were designed to discourage claimants from exercising their right to a hearing. Once again, VA officials acknowledged in discovery that these letters—which were dictated for particular cases and were not "pattern" or form letters used throughout the VA (see Verrill Dep. 80-84)—were

ill-advised and inappropriately drafted in certain respects. See Verrill Dep. 81; Standefer Dep. 127-132; Woodall Dep. 55-57, 290-295. Even if these letters were incorrect, however, they afford no ground to impugn the integrity and fairness of the VA or to invalidate the fee limit.[16]

---

[16] Appellees raise a miscellany of other criticisms (NARS Br. 6-7, 17-18) that can be addressed only briefly here. Contrary to appellees' assertion, all of the VA witnesses correctly understood the rule of presumptive eligibility and stated that any errors in its application were rare. See Verrill Dep. 46, 447-498, 501, 563-564; Woodall Dep. 37-38, 45, 191; Phillips Dep. 73; Jacobson Dep. 172. Regional offices do not request independent private medical examinations because they routinely obtain VA exams and are encouraged to refer close cases involving a reasonable doubt to the VA Central Office (which can, where appropriate, seek an independent exam). See Verrill Dep. 16, 51-52, 127, 231; Woodall Dep. 39, 43-44, 117; Jacobson Dep. 56, 59, 80, 151. The VA seldom uses its subpoena power because it has no trouble in obtaining necessary records and therefore does not have to resort to formal process. See Verrill Dep. 62; Standefer Dep. 248; Phillips Dep. 67; Jacobson Dep. 135. The VA relies on the Defense Nuclear Agency of the Department of Defense as the office responsible for and expert in obtaining radiation information from all areas of the government and determining radiation dosages in veterans' claims involving atomic radiation. See Verrill Dep. 21, 53, 99, 316; Standefer Dep. 229, 238, 326; Woodall Dep. 47, 78, 210, 212; Jacobson Dep. 73, 84, 157; R. 151, Exh. 186, at 1, 3. The VA allows so-called "buddy" statements from fellow servicemen to corroborate a claim but generally leaves it to the veteran or the service representative to obtain the statement, and in fact buddy statements are frequently submitted (see Verrill Dep. 313, 317, 550; Standefer Dep. 226, 251, 269; Woodall Dep. 78, 155-157; Phillips Dep. 42; Jacobson Dep. 104, 107); moreover, all Agent Orange and atomic radiation claims are forwarded to the VA Central Office, which maintains an index of such cases and a registry for identifying and locating claimants (see Verrill Dep. 33, 205, 212, 214, 492, 499-500; Standefer Dep. 27-28, 77-78; Woodall Dep. 159, 275; Jacobson Dep. 56, 128; Hawke Dep. 126; see also VA Br. 28 n.26). The figure of 2.84 hours per claim is part of a management productivity review system that, in evaluating performance, considers quality as well as efficiency; more time is often spent on particular claims, and the number 2.84 hours is merely the expected *average* processing time for claims over a six-month period. See Verrill Dep. 167-175; Woodall Dep. 48-53, 245; Phillips Dep. 43; Jacobson Dep. 130-132; Hawke Dep. 63, 139, 143.

3. Appellees contend that service representatives do not provide adequate assistance to claimants.[17] While there is, of course, some variety among the thousands of service officers, every VA official testified below that such representation is effective and meaningful. See Verrill Dep. 198, 245-246; Standefer Dep. 48, 176-181, 195, 199, 201, 231, 236, 305-307; Woodall Dep. 80, 102, 256-259, 268; Phillips Dep. 17, 35, 47, 60-61; Jacobson Dep. 179-183; Hawke Dep. 37-38. These depositions, as well as the affidavits submitted by several national service organizations, explain the training that the representatives receive, the intimate knowledge and familiarity they develop through their day-to-day involvement in the claims system, and the ready access they have to VA personnel and materials. See Verrill Dep. 207, 210, 237-238; Standefer Dep. 176-181, 201, 236-238, 306-307; Woodall Dep. 80, 102; J.A. 160-169, 173-177; R. 176, Fong Att. And on the infrequent occasions when a service representative has not adequately developed or presented a claim, the record shows that VA personnel have acted to protect the interest of the veteran. See Verrill Dep. 199; Phillips Dep. 17; Jacobson Dep. 180-181, 184.[18]

Strong corroboration of the adequacy of this representation is the fact that claimants represented by serv-

---

[17] Appellees appear to confuse (NARS Br. 9) local members of service organizations, who may be part-time and unpaid volunteers, with accredited national service officers, who can represent veterans in VA claims and are full-time and paid employees of the service organizations. See Verrill Dep. 248, 505; Standefer Dep. 185; Woodall Dep. 92-93; J.A. 160-161, 173-175.

[18] In the case of plaintiff Maxwell, for example, a service representative interviewed him for more than two hours at their first meeting, arranged for a medical examination, had several telephone conversations with Maxwell, scheduled a VA hearing, met with Maxwell for 45 minutes before the hearing, and conducted Maxwell's presentation before the VA (J.A. 315-317). Moreover, another service representative located records that Maxwell had been unable to obtain (J.A. 326). While we do not contend that this example is necessarily typical, it is at least as illuminating as the unusual and extreme instances that appellees cite to show the inadequacy of service representatives.

ice organizations have virtually the same rate of success—and in some instances a higher rate—than claimants represented by an attorney. See J.A. 163-164, 190-191, 535-541, 574-582; see also VA Br. 42-43. Appellees contend (NARS Br. 14 n.7) that these statistics are not meaningful because attorneys currently appearing before the VA are handicapped by their general unfamiliarity with the claims system and the limited time and resources they can devote to a case in light of the fee limit. But appellees overlook the fact that service organizations, unlike attorneys, represent any claimant who requests their assistance regardless of the prospects of prevailing on the claim. See J.A. 163-164, 176. On balance, the available statistics—which are the only objective measure of performance that has been presented in this case—are sufficient at a minimum to confirm that service organizations provide effective representation.

Finally, appellees' specific criticisms of service organization representation are unfounded. The written submissions of service officers, which generally consist of a two-page typed statement presenting the claimant's position and supporting facts, are recognized by the VA to be fully adequate (see Standefer Dep. 9, 168-169, 182, 184, 305-306; Woodall Dep. 80-81; Phillips Dep. 20, 49, 61, 91); given the BVA process and the primarily medical rather than legal nature of the issues that arise (see Standefer Dep. 290; Woodall Dep. 75; Phillips Dep. 23-24; Jacobson Dep. 25, 171), the fact that service representatives do not file lengthy briefs with extensive citation to authorities, as appellees would prefer, does not indicate any shortcoming on their part. Nor is it the case that the submission to the BVA is frequently written by the claimant himself rather than the service representative; while claimants may fill out a simple VA form to complete the docketing of the appeal, the substantive presentation to the BVA is prepared by the service representative. See Standefer Dep. 9, 168-169, 182-184; Woodall Dep. 80-81; Phillips Dep. 20, 49, 91.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10195